

REPORT OF THE PUBLIC ACCESS OMBUDSMAN

The General Assembly created the Public Access Ombudsman through the same statute that created the PIACB. The Ombudsman's duties involve making reasonable attempts to resolve disputes between applicants and custodians relating to requests for public records under the PIA, including issues involving exemptions, redactions, failure to respond timely, overly broad requests, fee waivers, and repetitive or redundant requests. *See* § 4-1B-04 of the General Provisions Article of the Maryland Code.

This report contains a description of the Ombudsman's activities during the past year and a half, including some patterns and frequent issues that appear from the mediations, and possible solutions.

ACTIVITIES OF THE OMBUDSMAN

The Office of the Public Access Ombudsman began operations on March 30, 2016. During the nearly 18 months since then, the Ombudsman's activities have included:

- performing tasks necessary to establish the Ombudsman program;
- handling PIA mediation matters and other information requests regarding the PIA;
- developing protocol for intake, case management, and reporting;
- participating in outreach and training activities at the invitation of agencies, municipal associations, press organizations, and non-profit advocacy groups; and
- performing tasks necessary to carry out the investigation and report required by H.B. 1105 pertaining to the Howard County Public School System (this report was published December 30, 2016).

Attached to this report is a summary of the volume and types of requests the Ombudsman has handled from inception through August 25, 2017.

PROGRAM EVALUATION

The Ombudsman receives requests for assistance from a wide variety of requestors, and less frequently, from agencies. The program is informal and voluntary, involves diverse participants, and covers a wide range of issues. The information needs, motivation, capacities, and resources of the requestors and agencies affect the mediation process and outcomes. All of these factors make it difficult to measure or evaluate the relative success of particular mediations or of the Ombudsman program generally by any uniform, objective set of criteria.

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Nonetheless, several important factors appear to have an impact on the effectiveness of the program and mediation outcomes. The Ombudsman believes that the likelihood of a successful outcome in PIA mediations often is enhanced or diminished by several factors:

- ***Timing of a request for the Ombudsman's help:*** a greater likelihood of effective and constructive communication exists when assistance is sought soon after a dispute emerges concerning a particular PIA request, response, or non-response;
- ***The length of time to complete a mediation:*** the program consistently carries open mediation requests into the next month, and some matters remain open with varying degrees and levels of activity over a period of months; principal factors that may increase the time spent mediating a request include the availability of the parties, the cooperation of the parties, and the schedule of the Ombudsman; matters that are reached early (within a week or two) usually make better progress and achieve more positive results than those that take longer;
- ***The participants' capacity to engage in the mediation process:*** key factors to success are the participants' availability, understanding of the purpose of mediation, and willingness to engage in the process with the aim of constructive problem-solving, including the ability to appreciate another's point of view and to consider alternatives;
- ***The Ombudsman's knowledge of and experience working with participants:*** in general, the Ombudsman believes that her effectiveness in mediating PIA disputes is enhanced by knowledge of agency needs and processes, and the continued development of good working relationships with all participants.

SYSTEMIC ISSUES AND POTENTIAL IMPROVEMENTS

Among the patterns that have arisen from the Ombudsman's work, several systemic PIA problems appear to exist, which are described in this section, along with some suggested solutions or strategies for improvement. A few items overlap (e.g., fees assessed to inmates who establish indigence and the denial of fee waiver requests made by individuals generally). Moreover, some proposals may create incentives to improve PIA compliance or provide a remedy where currently there is none (e.g., if an agency cannot charge a fee for a late response, it might be motivated to improve its records management and PIA handling process in a manner that facilitates timely response).

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- ***No response patterns, including response that records are “lost” or “presumed destroyed”:*** approximately 20% of PIA matters brought to the Ombudsman for assistance involve instances in which *no response* has been received by the requestor within the 30-day period required by the PIA; variations on this theme include the regular issuance by some agencies of “non-conforming” PIA responses to the effect that records are presumed to have been lost or destroyed because they cannot be located or otherwise accounted for; frequently, the problem is due at least in part to disorganized (or no) filing systems and poor records retention and management practices; no remedy exists to address this issue, nor can mediation resolve it.

Possible solution: this systemic issue will continue in those agencies unless they are required to address the problem through clear records retention practices and trained personnel; additional resources would provide much-needed assistance to these agencies by enabling them to bring their records management systems up to date and to provide training for their staff in records management.

- ***PIA fees are cost-prohibitive to inmates and effectively deny them access to public records:*** inmates often seek records from law-enforcement agencies (police departments and state’s attorney’s offices), and related agencies, regarding their conviction or conditions of confinement; the requests tend to be for specific records, making the strategy of reframing a broad request through mediation of little value to the requester; because agencies have discretion regarding fee waivers, they often deny inmates’ requests for fee waivers as a matter of practice, even when indigence is established; the net result is that inmates are frequently denied access to requested records due to their inability to pay fees.

Possible solutions: require a fee waiver when an inmate establishes indigence *and* makes the request as a “person in interest”; develop inter-agency agreements (particularly between state’s attorney’s offices and the Office of the Public Defender) to allocate costs and fees for the production of transcripts, case files, and investigative records, with no charge to inmates.

- ***Compliance Monitoring/Reporting and Enforcement does not exist:*** the PIA creates a framework for the information agencies must provide to the public and the time periods in which to do so; when an agency does not handle PIA requests properly, there are limited means of challenging the agency response or for compelling an agency to respond (in cases where none is provided); similarly, when a requester submits repeated requests, or requests that are abusive or unduly

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burdensome, there is often no practical or meaningful avenue for relief available to the agency; moreover, some frequent types of issues, such as delayed agency response, non-response, or non-conforming response (e.g., that records are missing), cannot truly be remedied, but only prevented.

Possible solutions: implementing mechanisms for compliance monitoring would provide information regarding which agencies most need training and resources to improve their records management practices; information could be gathered through periodic PIA audits of agencies by an independent agency or office, or by requiring agencies to report or evaluate PIA compliance using internal logs and requestor surveys; further oversight could be established by expanding the jurisdiction of the PIACB to provide rulings and guidance regarding more PIA issues; the law also should provide an avenue for seeking relief when an agency receives unreasonable or abusive requests, other than resorting to the courts.

- **Denial of Fee Waiver Requests:** most agencies charge fees; costs for copies vary and hourly rates differ between agencies; many requestors have a perception that fees are imposed to avoid or restrict the requestor's access to records—a view that undermines the public confidence in state and local government—and whether intended or not, the assessment of fees often has this effect; for example, when agencies deny fee waiver requests based on indigence, the requestor usually is unable to obtain the requested records; at a minimum, the requester faces delayed or restricted access to records, a problem that is heightened with respect to inmate waiver requests, as discussed above.

Possible solutions: amend the PIA to preclude the assessment of fees when an agency fails to comply with the deadlines provided by the PIA (especially the 30-day response time); amend the PIA to provide mandatory waivers for certain types of requests and/or when indigence is established; identify objective criteria for waivers to enable meaningful evaluation of such requests; expand the jurisdiction of the PIACB to allow it to review these issues and provide enforcement.

- **Concurrent jurisdiction of the Ombudsman and the Board:** current law allows submission of a complaint to the Ombudsman and the Board simultaneously; the matters have been coordinated informally to avoid conflicting outcomes, but a clearer process would be helpful; the Board has limited jurisdiction to consider only the reasonableness of a fee; the Ombudsman can assist the parties in modifying the request to reduce the fees, but there is no next step to motivate them to do so.

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Possible solutions: establish a chronology for matters to proceed through the Ombudsman and the Board, so that participants know where to start the process; expand the Board's jurisdiction to include review of fee waiver denials and other compliance issues with clear criteria.

CONCLUSION

The Ombudsman wishes to thank the Attorney General for appointing her to this important position. In addition, the Ombudsman thanks the PIACB for providing this forum for sharing her experience and offering suggestions for improvement. Throughout the year, the Ombudsman posts statistical reports, helpful tips, and PIA-related news on the Ombudsman's website: (<http://news.maryland.gov/mpiaombuds/>) and on Twitter (@MPIA_Ombuds).

Respectfully submitted,

Lisa A. Kershner

Public Access Ombudsman

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MARYLAND PUBLIC INFORMATION ACT (PIA)
 The public's right to information about government activities lies at the heart of a democratic government.

Public Access Ombudsman

Since Inception (17 mo.)
 March 30, 2016 — August 25, 2017



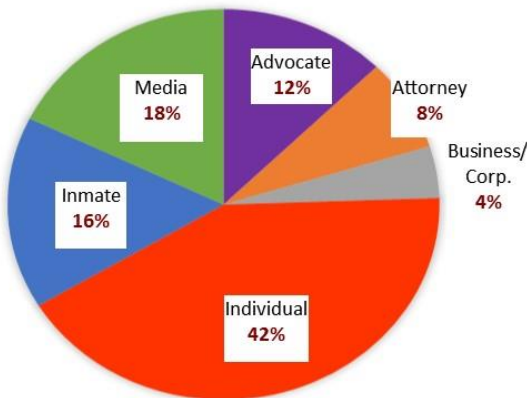
Since Inception; 17 Months

377 since April 1, 2016

- 327- Mediation requests
- 50+ - Other / "help-desk" inquiries

The Big Picture: Mediation saves money
 Early resolution of disputes saves time and resources and increases public knowledge and awareness of the PIA process. For example, mediation is entirely voluntary, confidential, and in many cases doesn't require an attorney.

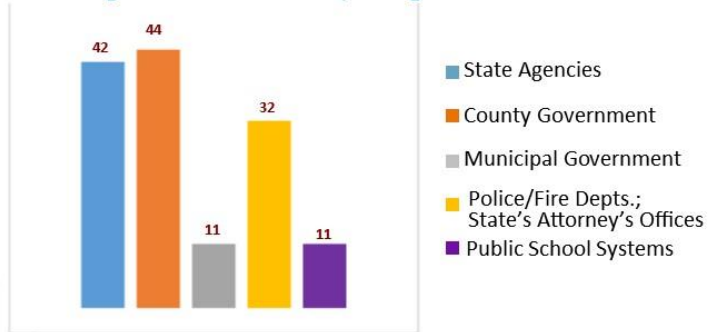
The Requestors



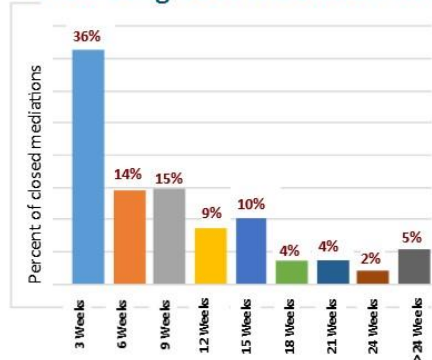
The Agencies

140 unique agencies participated in mediation matters with the PIA Ombudsman since the beginning of the program. Agency jurisdictions are state level, 19 different counties, 18 municipalities, and Baltimore City.

What Agencies are Participating in Mediation?

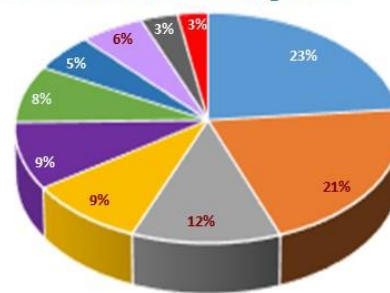


How Long does Mediation Take?



Range: 1 – 370 days.
 36% of the cases are resolved within 3 weeks and 50% by 6 weeks.

What are the PIA disputes?



Disputes are presented as framed by the requestor. Characterizations are based on how the requestors describe the issues. These are not findings.

Mediation March '16 –August '17	
New/Incoming cases between 3/31/16–8/25/17	328
Closed as of 8/25/17	277

- Misapplication of exemption
- MIA: No Response
- Partial, nonresponsive, or incomplete response
- Written Response, No Documents Produced
- Fees excessive
- Fee waiver request denied or ignored
- Does not believe response
- Asked for explanation of response
- Redaction inappropriate
- Other

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